



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

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BOSTON, MASSACHUSETTS 02114-2023**

**OFFICE OF THE
REGIONAL ADMINISTRATOR**

By Certified Mail - Return Receipt Requested

October 8, 2003

John M. Fowler
Executive Director
Advisory Council on Historic Preservation
1100 Pennsylvania Ave. NW, Suite 803
Washington, D.C. 20004

Re: National Historic Preservation Act (NHPA) No Adverse Effect Finding

Dear Mr. Fowler:

Under Section 402 of the Clean Water Act (CWA), 33 U.S.C. Section 1342, EPA is authorized to issue permits for the discharge of pollutants to waters of the United States under conditions required by the CWA. This permitting program is known as the National Pollutant Discharge Elimination System (NPDES) program. Section 402 also provides that EPA may approve states to administer equivalent state permitting programs in lieu of the federal permitting program upon a showing that the state has the necessary authority and a program sufficient to meet CWA requirements. When EPA approves a state permitting program, the state becomes primarily responsible for the issuance of NPDES permits in areas covered by the approved program, and EPA no longer issues permits in such areas. In December of 1999, the State of Maine completed its application to EPA requesting approval of the State's NPDES program for the entire State, including Indian territories within Maine. In January of 2001, EPA issued a final determination under CWA Section 402 approving Maine's application for all areas within the State other than Indian territories, regarding which EPA had not made a determination about the applicability of State law.

As part of EPA's evaluation of the State of Maine's application to administer the NPDES program, EPA has considered whether there are any potential effects of this decision on historic properties in Maine. As discussed in its December 30, 1999, and February 28, 2001, Federal Register notices, the Agency found that approval of Maine's program outside Indian territories has no effect on historic properties. 64 Fed. Reg. 73552 (December 30, 1999); 66 Fed. Reg. 12791 (February 28, 2001). As described in greater detail below, under Section 106 of the NHPA, 16 U.S.C. Section 470f, and the Advisory Council on Historic Preservation (Advisory Council) regulations at 36 C.F.R. Part 800, EPA consulted with the Maine State Historic Preservation Officer (SHPO), solicited public input regarding this determination, and engaged in

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substantial discussions with the Indian tribes located in Maine. Similarly, although EPA has not yet decided whether to approve the State's application to administer the NPDES program within Indian territories, the Agency believes that such an approval, if given, would also have no effect on historic properties. EPA has continued to consult with the Indian tribes in Maine regarding this finding.

To formally advance the NHPA consultation process so that EPA will be able to make a determination on the unresolved portion of Maine's application to administer the NPDES program within Indian territories, EPA proposed a No Adverse Effect finding pursuant to 36 C.F.R. Section 800.5(b) in a July 25, 2003 letter to the Penobscot Nation and Passamaquoddy Tribe (collectively, the Tribes). A copy of EPA's proposed finding, which was received by the Tribes on July 28, 2003, is enclosed as Attachment A.¹ In accordance with 36 C.F.R. Section 800.5(c)(2), the Penobscot Nation submitted its disagreement with the Agency's proposed finding on September 3, 2003.² A copy of the Penobscot Nation's letter of disagreement is enclosed as Attachment B. The Passamaquoddy Tribe did not respond to EPA's proposed finding.³

As a result of the Penobscot Nation's disagreement and pursuant to 36 C.F.R. Section 800.5(c)(2), EPA requests that the Advisory Council review EPA's No Adverse Effect finding in accordance with 36 C.F.R. Section 800.5(c)(3). As required by 36 C.F.R. Section 800.5(c)(3), the Agency has included additional documentation specified in 36 C.F.R. Section 800.11(e) as Attachment C to this letter.⁴

At the same time we received comments from the Penobscot Nation in response to my July 25, 2003 letter, we received a letter dated September 3, 2003 from Don L. Klima, Director of the Advisory Council's Office of Federal Agency Programs, to me (enclosed as Attachment D), in which Mr. Klima asks EPA to provide information regarding how the Agency fulfilled its NHPA

¹As noted in that letter, EPA's position is that there would be no historic properties affected by approval of the State's program. However, because the Tribes had expressed disagreement with EPA's position and raised concerns during the consultation regarding potential adverse effects on historic properties, EPA proposed a No Adverse Effect finding under 36 C.F.R. Section 800.5(b) in lieu of a No Historic Properties Affected finding under 36 C.F.R. Section 800.4(d).

²In response to a request from the Penobscot Nation, EPA agreed to extend the Nation's 30 day review period by one week.

³Under 36 C.F.R. Section 800.5(c)(1), the Passamaquoddy Tribe's failure to respond is considered agreement with the finding.

⁴We have also included a September 16, 2003 comment letter from Matthew D. Manahan, Pierce Atwood, to Stephen Silva, EPA, in this Attachment.

Section 106 responsibilities prior to approving the State to administer the NPDES program outside Indian territories in 2001, and "prior to delegation regarding tribal lands." As an initial matter, EPA would like to clarify that the Agency has not yet decided whether to approve Maine's application to administer the NPDES program in Indian territories. As part of the NHPA consultation, the Agency has proposed, however, that approval, if given, would have no adverse effect on historic properties of interest to the Tribes. As a result and in accordance with the Advisory Council's regulations at 36 C.F.R. Sections 800.5(b) and (c), EPA has proposed the attached No Adverse Effect finding in the event EPA makes such a decision. We provide the following background in response to Mr. Klima's request and to assist the Advisory Council in its review of EPA's proposed finding regarding the pending decision.

Following receipt of the State's complete application to administer the NPDES program, EPA published notice of the application in the Federal Register, informed the public of a hearing to be held in Augusta, Maine, and solicited public comment. 64 Fed. Reg. 73552 (December 30, 1999). As part of that notice, EPA included its determination that approval of the State's permitting program would be a federal undertaking within the meaning of the NHPA and informed the public of the Agency's view that the approval itself would have no effect on historic properties within the State of Maine. Apart from certain information submitted by the Tribes (with whom EPA was separately discussing NHPA issues), EPA received no comments from the public regarding the NHPA or the protection of historic properties generally.

Prior to approving the State to administer the NPDES program outside of Indian territories in 2001, the Agency engaged in significant discussions with both the State and the Tribes regarding the effect of any approval on historic properties in Maine, including historic properties of interest to the Tribes. As described in EPA's February 2001 Federal Register notice (66 Fed. Reg. 12791), the SHPO agreed that there would be no historic properties affected or no adverse effect by virtue of EPA's approval of the State's program on the condition that the Maine Department of Environmental Protection (Maine DEP) provide the SHPO with notice and certain relevant information regarding subsequent permitting actions.

To ensure that notice and other information concerning permits are provided to the SHPO, the SHPO and Maine DEP entered into a Memorandum of Understanding (MOU) in November 2000. This MOU ensures that the SHPO will receive notices and relevant information, and provides for coordination between Maine DEP and the SHPO to ensure that the SHPO's views are appropriately considered and attempts are made to resolve issues identified by the SHPO during implementation of the State's NPDES program. A copy of the MOU is enclosed as Attachment E to this letter. The MOU notes that where Maine DEP and the SHPO are unable to resolve an issue, the SHPO may seek EPA involvement consistent with EPA's CWA authorities. This agreement satisfied the condition underlying the SHPO's no historic properties affected/no adverse effect determination. See 66 Fed. Reg. at 12794.

Consistent with the Advisory Council's regulations, EPA also engaged in significant discussions with the Tribes regarding the State's application and the Agency's view that approval would have

no effect on historic properties in Maine. On January 27, 2000, EPA met with the Tribes near the Penobscot Nation's reservation to discuss the Agency's proposed determination. EPA also met individually with several of the tribes located in Maine, including a meeting on February 25, 2000 with the Passamaquoddy Tribe, to discuss issues under the NHPA. In addition, the Penobscot Nation submitted written comments concerning this determination to EPA in letters dated February 25, 2000 and June 7, 2000; the Passamaquoddy Tribe submitted written comments to EPA on August 18, 2000. We note that the Penobscot Nation also wrote to the Advisory Council on February 25, 2000 and June 7, 2000, and described the Tribe's views regarding potential approval of the State's program. EPA met with the Advisory Council in your offices on May 4, 2000, to discuss the Tribe's concerns and other issues relevant to the NHPA consultation. (Copies of these letters are included with the information enclosed as Attachment C.)

To address tribal concerns regarding their ability to participate in the consideration of historic properties during implementation of the NPDES program by Maine DEP, and in recognition of the federal government's trust responsibility to the Tribes, EPA submitted a draft Memorandum of Agreement Regarding Tribal Historic Properties in Maine (MOA) to the Tribes. (A copy of the draft MOA is included with the information enclosed as Attachment C.) Under the terms of the draft MOA, EPA would agree to exercise its CWA oversight authority of the Maine NPDES program to help ensure appropriate consideration of tribal views regarding the effect, if any, of State permitting actions on historic properties of interest to the Tribes. In particular, EPA would agree to help ensure that the Tribes receive notice of State permit actions involving dischargers of concern to a Tribe. Among other things, EPA would also commit to utilize its CWA authorities to object to a State permit (or take other appropriate action) to seek to address tribal concerns regarding historic properties where the Agency finds (taking into account all available information, including any analysis conducted by the Tribes) that a State permit is inconsistent with the CWA, including water quality standards designed to protect tribal uses of the relevant waters. EPA believed that the draft MOA included significant opportunities for the Tribes to provide their views on State permitting actions as well as important commitments by the Agency to exercise our oversight authorities to help ensure that any tribal concerns are appropriately considered. EPA thus considered the draft MOA an appropriate resolution of the Tribes' concerns within the limitations of our CWA authorities.

Since August 2000, and as described in more detail in the attached No Adverse Effect finding, EPA made numerous attempts to continue discussions on the draft MOA to reach a consensual resolution of the parties' consultation. After it became clear that discussions with the Tribes had reached an impasse, EPA formally proposed the attached No Adverse Effect finding.

As noted above, the Penobscot Nation has submitted its disagreement with EPA's finding. In particular, the Tribe describes their view that the impact of future permits issued by the Maine DEP on properties of cultural and historic interest to the Tribe cannot be fully anticipated at this

point. The Tribe has previously indicated their view that a programmatic agreement under the Advisory Council's regulations would be an appropriate resolution.⁵

EPA has considered and appreciates the Penobscot Nation's concern regarding issues that may arise during implementation of the NPDES program by Maine DEP. EPA continues to believe that a decision under the CWA regarding a state's authority to run the NPDES program and whether to transfer administration of that program to a state does not affect any specific historic property. It also remains EPA's position that permitting actions by an approved state are not federal undertakings subject to NHPA Section 106 review.⁶ Nonetheless, to address the Penobscot Nation's concerns and consistent with the trust responsibility to the Tribes, EPA proposed the draft MOA described above. The procedures and commitments described in the draft MOA provide appropriate opportunities for the Tribes to provide their views regarding historic properties during implementation of the Maine NPDES program. The draft MOA also provides important procedures for the Tribes to work with EPA, as well as commitments by EPA to exercise our oversight of the State's program to help ensure that tribal concerns with particular permits are addressed. EPA believes that these procedures and commitments are the most appropriate means of addressing the Penobscot Nation's concerns consistent with the federal government's trust responsibility, the limitations on EPA's oversight authorities, and the federalist scheme created by the CWA. Even though the Tribes have decided not to enter into an MOA at this point, EPA will nonetheless follow the procedures and exercise our oversight authorities as described in the draft MOA. Thus, irrespective of any disagreement regarding the effect of a decision to approve the State's program, EPA has agreed to utilize its existing authorities to address tribal concerns regarding the consideration of historic properties during implementation of the State program.⁷

EPA does not believe that resolution of this matter requires execution of a programmatic agreement pursuant to 36 C.F.R. Section 800.14. Programmatic agreements are not required under the Advisory Council's regulations but may be used in certain circumstances described therein. See 36 C.F.R. Section 800.14(b)(1). In this case, EPA does not agree that an action approving the State's program would have effects on historic properties or that a programmatic agreement would thus be appropriate. EPA believes that the procedures and commitments of the draft MOA with the Tribes (which EPA will implement unilaterally if no MOA is ultimately

⁵In his September 3, 2003 letter to EPA, Mr. Klima also notes the view that it is not possible at this point to determine that the administration of the NPDES program by Maine DEP will not adversely affect historic properties. Mr. Klima and the preamble to the Advisory Council's recently proposed amendments to the NHPA Section 106 regulations (68 Fed. Reg. 55354, 55355 (September 25, 2003)) suggest that a programmatic agreement would be appropriate.

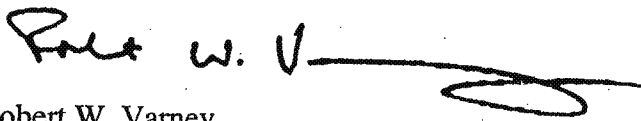
⁶The recent decision in *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) and the Advisory Council's proposed amendment to 36 C.F.R. Section 800.16(y) (68 Fed. Reg. at 55355, 55358) support EPA's position.

signed) provide the best means of addressing tribal issues during implementation of the Maine program within the confines of EPA's CWA authorities and that a programmatic agreement, which would not provide EPA with any additional oversight authority to act with respect to a particular State permit, is unnecessary.

Given these procedural protections, EPA is confident that historic properties of interest to the Tribes will not be adversely affected by any approval of Maine's NPDES application.

In accordance with 36 C.F.R. Section 800.5(c)(3), EPA looks forward to notification of the Advisory Council's views, if any, within 15 days from receipt of this submittal. If you have any questions or need additional information, please contact me at (617) 918-1012, or have your staff contact Pamela Hill, EPA New England Deputy Regional Counsel, at (617) 918-1092.

Sincerely,



Robert W. Varney
Regional Administrator

Enclosures

cc: Chief Barry Dana, Penobscot Nation
Governor Melvin Francis, Sr., Passamaquoddy Tribe of Indians, Pleasant Point Reservation
Governor Robert Newell, Passamaquoddy Tribe of Indians, Indian Township Reservation
Donald Soctomah, Tribal Historic Preservation Officer, Passamaquoddy Tribe of Indians,
Indian Township Reservation
Kaighn Smith, Drummond, Woodsum & MacMahon
Dawn Gallagher, Commissioner, Maine Department of Environmental Protection
Earle G. Shettleworth Jr., Maine State Historic Preservation Officer
Pamela Hill, Deputy Regional Counsel, EPA New England